

MICHAEL A. SUMPTER, JR.)	
Claimant)	
)	
VS.)	
)	
BAGCRAFT CORP. OF AMERICA)	
Respondent)	Docket No. 268,442
)	
AND)	
)	
ZURICH U.S. INS. COMPANY)	
Insurance Carrier)	

The Board considered the record and adopted the stipulations listed in the ALJ's Award dated February 28, 2003. In addition, the Board considered the March 3, 2003, continuation of deposition of Albert E. Porter and the May 16, 2002 court-ordered independent medical examination report by Vito J. Carabetta, M.D.

ISSUES

An Award was entered in this matter by the ALJ on February 28, 2003. That Award was timely appealed to the Board by claimant. The parties agreed that the record considered by the ALJ was incomplete and, pursuant to claimant's request, the Board remanded this matter to the ALJ ". . . for reconsideration of the parties' request for an extension of terminal dates, to include the transcript of the March 3, 2003 continuation of the deposition of Albert E. Porter in the record, and for such further proceedings and relief as the court may deem appropriate." ¹

Following the Board's August 22, 2003 Order remanding this claim to the ALJ, Judge Frobish issued his Order dated September 2, 2003. No additional hearings were held and no additional evidence was presented. After considering the transcript of the March 3, 2003 continuation of deposition of Albert E. Porter, Judge Frobish found that there was ". . . no new evidence contained within that deposition which would cause this [c]ourt to alter its opinion on the issue of whether or not the [c]laimant provided proper notice. The Award entered by this [c]ourt on February 28, 2003, remains in full force and effect with no changes."²

During oral argument to the Board, the parties announced there was no additional evidence that either party desired to present to the ALJ and that the record was now complete. The issues for the Board's review remain the same as that enumerated in the Board's prior order. Those are, specifically:

1. Did claimant provide timely notice of accident as required by K.S.A. 44-520?
2. Did claimant suffer injury by accident arising out of and in the course of his employment with respondent on the dates alleged?
3. If so, what is the nature and extent of claimant's injury and disability?
4. What is claimant's average weekly wage?
5. Did claimant have a preexisting impairment of his back and/or upper extremities and, if so, is respondent entitled to a credit under K.S.A. 44-501(c)?

¹ *Sumpter v. Bagcraft Corp. of America*, No. 268,442, 2003 WL 22150473 (Kan. WCAB Aug. 22, 2003).

² ALJ Order (Sept. 2, 2003).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant alleged injury by a series of accidents occurring "[e]ach and every working day beginning March 2001, and ending April 1, 2001."³ Respondent contends that claimant's claim is time barred by K.S.A. 44-520 because claimant failed to provide timely notice of his alleged series of accidents and injuries. Because the ending date of the alleged series is April 1, 2001, notice was required to be given within ten days thereafter. The period for giving notice may be extended to 75 days upon a showing of just cause.⁴

Respondent alleges that the first notice it received of claimant's alleged work-related accidents and injuries occurred on or about August 6, 2001, when respondent received a letter from the claimant's attorney and the form K-WC E-1 Application for Hearing, which was dated August 3, 2001. As these were received more than 75 days after the last date of claimant's alleged series of accidents, the letter and the Application for Hearing cannot satisfy the notice requirement of K.S.A. 44-520.

Claimant testified that he gave timely notice to his supervisors contemporaneous with his series of accidents.

Q. (Mr. Phalen) And did you ever voice any complaints to any leadman or supervisor that your hands and arms and low back were bothering you at work?

A. (Mr. Sumpter) Yes.

Q. Who were you telling you'd been injured at work?

A. Supervisors, leadmen, crew chiefs.

Q. Can you tell us any of their names?

A. Randy Seeber, Dan Sanders, Tim Ratliff. I'm trying to think of what the other guy's name is. Art Walker.

Q. And when were you telling these leadmen and supervisors about your injuries there at work?

A. Every day.

³ K-WC E-1 Application for Hearing (filed Aug. 8, 2001).

⁴ K.S.A. 44-520.

Q. And when do you remember first starting having problems with your low back and hands? Evidently the low back started in 97?

A. 97.

Q. But when did you start talking about your hands and arms?

A. In 2000. They really started bothering me and I told them about, I had a bump come up on my arm (indicating) and - -

Q. You're pointing to your right forearm?

A. Yes. Yes.

Q. And who did you tell about the bump on your right forearm?

A. Randy Seeber.

Q. And what kind of problems were you having with your hands and arms in the year 2000?

A. They kept going numb and I kept having tingling and hurting and aching.

Q. And as time went on in 2000, going on into 2001, did the condition in your hands and arms stay the same, get better or worse?

A. Worse

Q. And did your complaints to your various leadmen and supervisors increase as the symptoms increased?

A. What was that again?

Q. Did your complaints or your notice that you were telling your employer about the injuries to your hands and arms, did you complain more as the symptoms got worse?

A. Yes.

Q. And how about your back, when did you start noticing your back getting worse?

A. In 2000. It started really starting to ache and I was going to the doctor three and four times a week and he said it was because I was bending too much.

Q. Which doctor was that?

A. Dr. Bazzano.⁵

Stephen J. Bazzano, D.O., is claimant's personal physician and has treated claimant for various ailments over many years including diabetes and hypertension. In 1993 Dr. Bazzano saw claimant for a work-related carpal tunnel syndrome condition for which he referred claimant to orthopedic surgeon John M. Veitch, M.D.

On September 26, 1997, claimant saw Dr. Bazzano for low back pain. Dr. Bazzano's records show a five year history of low back complaints. He referred claimant to neurosurgeon Hish S. Majzoub, M.D. A myelogram performed that year showed slight bilateral nerve impingement at the L4-L5 level and mild spondylosis at that level.⁶ A CT scan with contrast performed that same day showed disc bulging at the L4-L5 level and L5-S1 levels with possible herniated nucleus pulposus at L4-L5.⁷ Prior medical records show claimant also received a lumbar myelogram and CT scan on May 18, 1992. Claimant also was treated for cervical complaints in 1997. Cervical x-rays showed spurring at C6 but no significant intervertebral disc space narrowing. It appears that claimant received physical therapy and prescription medications for the back and neck conditions and was released.

On March 1, 1999, Dr. Bazzano wrote a letter to respondent advising "Michael was diagnosed in 1997 by Dr. Majzoub with bulging discs. It is necessary for him to wear a back brace when lifting and not to exceed 45 pounds of weight to be lifted."⁸ Dr. Bazzano's records show no treatment for back complaints thereafter. Although claimant saw Dr. Bazzano on several occasions thereafter, there is no mention of neck, back or upper extremity complaints again until January 18, 2001. On that date claimant reported "neck pain, numbness in his hands and arms."⁹ Dr. Bazzano referred claimant back to Dr. Veitch. Subsequent office visits to Dr. Bazzano on February 23, March 6, April 16, May 21, August 30, September 5, November 2 and December 3, 2001, make no mention of hand, neck or

⁵ R.H. Trans at 18-20.

⁶ Bazzano Depo. Ex. 1.

⁷ *Id.*

⁸ *Id.*

⁹ Bazzano Depo. at 13

low back complaints.¹⁰ Dr. Bazzano's records further show that claimant was seen at the hospital emergency room in March 2001 for chest pain and was evaluated for a possible heart attack.

Claimant was evaluated by Dr. Veitch on February 2, 2001. The patient information sheet claimant completed on that date asked the question "is the condition you are being treated for the result of an accident?" To which claimant marked "yes." The form then asked for the cause of the accident and claimant checked the box for "work."¹¹ Despite this, all of claimant's medical bills were submitted to his private health insurance carrier, Blue Cross/Blue Shield and not to respondent's workers compensation insurance carrier. Dr. Veitch eventually performed bilateral carpal tunnel release surgeries on claimant with the right upper extremity surgery being performed on April 2, 2001, and the left upper extremity on June 11, 2001. He was released to full work activities on August 12, 2001.¹²

Albert E. Porter is the environmental services manager for respondent. His job duties include handling all of the workers compensation claims for respondent. Mr. Porter testified that respondent first became aware of claimant's upper extremity problems on or about March 29, 2001, when claimant approached his lead man, Randy Seeber and foreman, Bob Arnce and said he was going to have carpal tunnel surgery.¹³ Claimant told them that his condition was not work-related. As a result, claimant applied for and received short term disability benefits for the 17 weeks he was off work for the carpal tunnel release surgeries. The first notice respondent had that claimant was alleging work-related injuries to his arms, right leg and back was a letter received from claimant's attorney on August 6, 2001.¹⁴ Mr. Porter testified that if claimant had reported his injuries as work-related previously, respondent would have immediately provided medical treatment. Mr. Porter testified that claimant had previous work-related injuries and had requested and received treatment for those through respondent and so claimant was familiar with the procedure for reporting accidents and was aware respondent would authorize medical treatment.¹⁵ When claimant applied for short term disability benefits on March 29, 2001, he checked the boxes on the application form representing that his condition was not related to his

¹⁰ Sept. 5, 2001 office visit shows claimant had a right ear ache and a knot in the right side of his neck.

¹¹ Veitch Depo. Ex. 2.

¹² *Id.*

¹³ Porter Depo. at 6.

¹⁴ *Id.* at 9.

¹⁵ *Id.* at 13 and 14.

occupation, that he had not filed a workers compensation claim and that he did not intend to file a workers compensation claim.¹⁶

Claimant argues that the reason he did not want to report his injuries as work-related and seek medical treatment through respondent was because he was afraid he would lose this job. He had previously been disciplined and written up for safety violations and warned about possible consequences if there were further violations. Claimant was concerned that if he reported a work-related accident this could constitute a safety violation. However, this argument is inconsistent with claimant's testimony that he repeatedly reported his work-related injuries to his lead man and foreman. Claimant testified that he complained about his hands, arms and low back and reported injuries to his supervisors at work "every day" during the year 2000. The Board also finds claimant's testimony that he gave notice "every day" is not credible in light of the disability claim form he completed and signed before leaving work for the carpal tunnel release surgeries. Claimant also testified that his low back pain started in 1997, but in the year 2000 grew significantly worse to the point where he "was going to the doctor [Dr. Bazzano] three and four times a week."¹⁷ Dr. Bazzano's records were made an exhibit to his deposition. Those records show that he never saw claimant for back complaints during 2000. In addition, Dr. Bazzano saw claimant nine times during 2001, not one of those visits was for low back pain. This inconsistency between claimant's testimony and Dr. Bazzano's records casts further doubt on claimant's credibility. The Board finds credible Mr. Porter's testimony that the first notice respondent received that claimant was alleging his injuries to be work-related was in August 2001. Consequently, claimant failed to give timely notice of his alleged accidents.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Jon L. Frobish dated September 2, 2002, is affirmed.

IT IS SO ORDERED.

¹⁶ *Id.* at Ex. 6.

¹⁷ R.H. Trans. at 20.

Dated this _____ day of May 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: William L. Phalen, Attorney for Claimant
Janell Jenkins Foster, Attorney for Respondent and its insurance carrier
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director